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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORLAND DIVISION

JENNIFER JOY FREYD,

Case No.: 6:17-cv-448-MC

Plaintiff,

v.

UNIVERSITY OF OREGON, MICHAEL H.
SCHILL and HAL SADOFSKY,

**DEFENDANTS UNIVERSITY OF
OREGON AND HAL SADOFSKY'S
RESPONSE TO PLAINTIFF'S
NOTICE OF SUPPLEMENTAL
AUTHORITY**

Defendants.

Defendants University of Oregon and Hal Sadofsky file this Response to Plaintiff's Notice of Supplemental Authority. Plaintiff argues that this court should assume how the Ninth Circuit will rule in *Rizo v. Yovino*, which was recently vacated by the U.S. Supreme Court. *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018); *Yovino v. Rizo*, 586 U.S. ___, No.18-227 (Feb. 25, 2019).

As an initial matter, *Rizo v. Yovino* is still not relevant to this case. The dispute there was about whether an employer could use a job candidate's old salary to set a salary if hired. That is

not at issue in this case and in any event, at the time plaintiff was hired, 1987,¹ the law was to the contrary. *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 878 (9th Cir. 1982).

Further, when the Court vacated *Rizo v. Yovino*, the result was to “to nullify or cancel; to make void.” *Massachi v. Astrue*, 486 F.3d 1149, 1154 n. 21 (9th Cir 2007). There is no precedential effect. *United States v. Gonzales*, 749 F.2d 1329, 1337 (9th Cir. 1984); *Kindred v. W. Transp. Co.*, Civil Action No. 77-606., 1980 U.S. Dist. LEXIS 14196, at *6 n. 2 (D. Or. Aug. 19, 1980), and the vacated opinion lacks persuasive authority. *Massachi*, 486 F.3d at 1154 (a vacated decision no longer exists); *Kuahulu v. Emp’rs Ins. of Wausau*, 557 F.2d 1334, 1337 (9th Cir. 1977) (vacating erases any precedential effect).

Plaintiff’s Notice of Supplemental Authority summarizes the vacated opinion and argues that it was correctly decided and unlikely to change on reconsideration. That is a theory; it is not the presentation of a supplemental authority. It also ignores the law cited above and the fact that “a judge may change his or her position up to the very moment when a decision is released.” *Yovino v. Rizo*, 203 L.Ed.2d 38, 40 (2019).

DATED this 18th day of March, 2019.

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¹ Freyd Decl. ECF 72, at ¶ 3.

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of March, 2019, I served the foregoing
DEFENDANTS UNIVERSITY OF OREGON AND HAL SADOFSKY'S RESPONSE TO
PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY on the following parties at the
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by the following indicated method or methods set forth below:

- Electronic Filing using the Court's ECF System**
- First-class mail, postage prepaid**
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- Overnight courier, delivery prepaid**
- E-mail**

s/Paula A. Barran

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